IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 05-cv-329-GKF**
	)	
	)	
TYSON FOODS, INC., et. al,	)	
	)	
	)	
Defendant.	)	

CHEROKEE NATION'S REPLY TO DEFENDANTS RESPONSE OPPOSING MOTION TO INTERVENE

The Cherokee Nation is seeking intervention in this case promptly after learning that the State could not adequately represent the Nation's interest in preserving and protecting the Illinois River Watershed. Under the definition of timeliness as set out in case law, the Nation's motion to intervene is timely due to the circumstances and the lack of prejudice to any party.

A decision regarding timeliness under FRCP 24(a) is a multifaceted consideration. Timeliness is not a function of counting days; it is determined by the totality of the circumstances. NAACP vs. New York, 413 U.S. 345, 366 (1973). Defendants argue that the Nation's Motion to Intervene is untimely due to the current status of the case. In this case we are on the eve of trial, but the status of the case or how far along litigation is developed is not the determining factor for evaluating timeliness. "Although the point to which the litigation has progressed is one factor to consider, it is not dispositive." Id.

Courts have specifically found that the timeliness requirement of F.R.C. P. 24(a) is a principle designed to ensure fairness to the existing parties, and should not be applied only to punish a late intervenor.

> The requirement of timeliness is not a tool of retribution to punish the tardy would-be intervenor, but rather a guard against prejudicing the original parties by the failure to apply sooner. Federal courts should allow intervention 'where no one would be hurt and greater justice could be attained.
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> Utah Ass'n of Counties vs. Clinton, 255 F.3d 1246 (10th Cir. 2002)(citing Sierra Club v. Espy, 18 F.3d 1202, 1213 (5th Cir. 1994).

Equitable considerations are appropriate when considering a motion to intervene and are favored by the courts over more rigid standards. The timeliness consideration is an elemental form of laches and estoppel, so a party may indeed be untimely if the applicant was negligent in failing to act more promptly, and as a result of that negligence an existing party's ability to defend or prosecute its claims is unfairly impaired. Stallworth v. Monsanto, 558 F.2d 257, 266 (5th Cir. 1977).Federal Courts have found that a motion to intervene should be granted if no party could be hurt and greater justice could be attained. Id. In this case, the Cherokee Nation has not delayed in filing through negligence, but rather because the Nation reasonably believed that its interests could be adequately represented by the State until the Court recently ruled otherwise. Further, no existing parties' ability to prosecute or defend its claims would be prejudiced by the intervention. Defendants sought involvement of the Cherokee Nation and the State welcomes it. In this case, all of the parties and the Cherokee Nation would be prejudiced by denying the Nation's motion to intervene and such a denial would not promote judicial efficiencies.

I. THE NATION REASONABLY RELIED UPON THE STATE TO PROSECUTE THE CLAIMS AGAINST THE DEFENDANTS FOR DAMAGE TO THE ENVIRONMENT.

The Supreme Court directly addressed a circumstance where an unnamed Plaintiff in a class action lawsuit against United Airlines was denied intervention on timeliness grounds in United Airlines Corp. vs. McDonald, 432 U.S. 385 (1977). Liane McDonald, a stewardess for United Airlines, was part of the unnamed class of defendants in a case seeking that United be

held liable for violations of Title VII of the Civil Rights Act of 1964. Id. at 389.The named Plaintiffs continued to prosecute the case on behalf of the class, but the class was struck by the District Court and the Circuit Court denied the interlocutory appeal of the decision. Id. at 388. Post-judgment, Ms. McDonald learned that the named Plaintiffs did not intend to appeal the District Court's decision striking the class. The court denied her motion to intervene, based upon the five years of intervening litigation that had occurred since the suit had been brought. The Supreme Court reversed the decision on the issue of timeliness.

> The critical fact here is that once the entry of final judgment made the adverse class determination appealable, the respondent quickly sought to enter the litigation. In short, as soon as it became clear to the respondent that the interests of the unnamed class members would no longer be protected by the named class representatives, she promptly moved to intervene to protect those interests.
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> Id. at 394.

The facts here are strikingly similar to the facts in United. Prior to the Court's ruling upon the Defendants dilatorily filed Rule 19 motion, the Cherokee Nation reasonably believed the State would be able to prosecute the claims against defendants for pollution of the Illinois River Watershed. Once the Cherokee Nation became aware that the State would no longer be allowed to adequately represent the Nation's interests, the Nation promptly moved for intervention.

The line of cases extending from United provides further insight into how the amount of time lapsed since the applicant became aware of its interest in the case should weigh in the court's consideration of timeliness. In Legal Aid Soc. of Alameda Co. v. Dunlop, 618 F.2d 48, 50 (9th Cir. 1980) the court entered a summary judgment in favor of the Legal Aid Society of Alameda County which required the USDA to enforce affirmative action requirements against its private contractors. The Chamber of Commerce initially relied upon the United States to

represent its interests, but after the United States abandoned its appeal of the summary judgment the Chamber believed that the circumstances had changed and that only by intervening in the case could their interests be protected. Id. The District Court held that the motion to intervene was untimely, as the Chamber had intervened on a prior occasion for a specific purpose and should have been aware that the United States could not protect the Chamber's interests. Id.

On appeal, the Circuit Court held that the District Court had erred in determining that the Chamber's motion was untimely based upon the amount of time that had lapsed since the Chamber became aware that it had an interest in the litigation.

> We rule that the district court did not apply the correct legal standard in finding the Chamber's second motion was not a timely one and that it should have considered the motion in light of the substantially different position that had then been assumed by the Government as the principal defendant. All of the circumstances of a case must be considered in ascertaining whether or not a motion to intervene is timely under Fed.R.Civ.P. 24. The date on which the party seeking intervention became aware of the litigation is by itself not always relevant. NAACP v. New York, 413 U.S. 345, 366, 93 S.Ct. 2591, 2603, 37 L.Ed.2d 648 (1973); Stallworth v. Monsanto Co., 558 F.2d 257, 264-66 (5th Cir. 1977). In particular, the relevant circumstance here for determining timeliness is when the intervenor became aware that its interest would no longer be protected adequately by the parties: this was the precise issue decided in United Airlines, Inc. v. McDonald, 432 U.S. 385, 394, 97 S.Ct. 2464, 2469, 53 L.Ed.2d 423 (1977).
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> Legal Aid II. at 51.

The Court's ruling in that case is directly applicable here[1].

As the Defendants point out in their Response through a variety of exhibits, it is beyond dispute that the Nation was aware of this litigation in 2005 and knew that the State was pursuing claims against Defendants for pollution of the waters of the IRW. In fact, in 2005 representatives of both the State and the Defendants traveled to Tahlequah to discuss these issues

[1] This reasoning has been adopted by other Circuits including the Tenth Circuit. See U.S. v. Detroit Intern. Bridge Co., 7 F.3d 497, 502 (6th Cir. 1993); National Wildlife Federation v. Gorsuch, 744 F.2d 963, 973 (3rd Cir. 1984). Elliott Industries Limited Partnership v. BP America Production Co., 407 F.3d 1091 (10th Cir. 2005).

with Cherokee Nation officials. Defendants' Response, pg.3. As Defendants' Exhibit B reflects, Chief Smith informed Attorney General Edmondson at that time that "we all agree that pollution by the poultry industry is a serious problem. I commend you for your interest in protecting our environment. If we can serve in any capacity, please advise.".

It is also undisputed that the Nation did not attempt to intervene in the case at any earlier date, though for different reasons than the Defendants state in their Response. Regardless, the Supreme Court has held that the date the applicant became aware of the litigation is, alone, not always relevant. NAACP v. New York, 413 U.S. 345, 366, (1973).

The Nation argues that the date the applicant became aware of the litigation is not particularly relevant in this case, except to show that in 2005 all parties were aware that the Cherokee Nation had an interest in protecting the environmental quality of the waters within the Illinois River Watershed.[2] Despite this joint awareness of the litigation, the State and the Defendants chose not to seek the Nation's joinder and the Nation chose not to intervene in a case where the State was taking adequate steps to represent the Nation's interest in protecting the quality and economic value of an important natural resource of the Nation.

The case at bar was not then, and is not now, a case about water rights, or who owns the waters in the IRW. It deals with environmental quality; and considering the extraordinary steps the State of Oklahoma was taking to protect the IRW, the Nation saw no need to interject itself as a party. The State seemed poised to adequately protect the Nation's interests in such a case. In

[2] There is some authority that a defendant cannot fairly claim prejudice when they are put on notice early in the litigation that additional Plaintiffs claims exist. "United can hardly contend that its ability to litigate the issue was unfairly prejudiced simply because an appeal on behalf of putative class members was brought by one of their own, rather than by one of the original named plaintiffs. … United was put on notice by the filing of the Romasanta complaint of the possibility of classwide liability, and there is no reason why Mrs. McDonald's pursuit of that claim should not be considered timely under the circumstances here presented. United Airlines, Inc. v. McDonald, 432 U.S. 385, 394 (1977).

fact, the Nation stood only to benefit by the State's willingness to prosecute a complex CERCLA case that would have strained the resources of the Nation.

None of the cases cited by the Defendants assist the Court in determining whether the Nation's Motion to intervene is timely. The non-federally recognized Timpanogos tribe in Ute Distrib. Corp. v. Norton, 43 Fed. App'x. 272 (10th Cir. 2002) was, as the Defendants correctly claim, asserting "aboriginal title to the water rights at issue in the underlying litigation." Affirming the District Court, the Tenth Circuit found that the Timpanagos tribe was not an indispensible party and their motion was untimely based upon the totality of the circumstances. One of those circumstances was the tribe's attempt "to transform the district court case from an APA challenge to the 1998 interpretation of the UPA into a quiet title action for the Ute reservation." Id. at 278. Although the Timpanogos tribe did attempt to intervene five years into the litigation, that factor alone did not lead the court to conclude that the motion to intervene was untimely.

> [T]he Red Rock Corporation was permitted to intervene even though its motion was filed after the Tribe's. The circumstances of the litigation when intervention is sought is only one factor the district court could consider, however. Id. Moreover, given the differences in the claims of the Timpanogos Tribe and of the Red Rock Corporation, a mere comparison of the filing dates cannot establish an abuse of discretion.

Id. at 276.

The Defendants attempt to draw similarities with Ute as involving "aboriginal title" are misguided. The Nation, if allowed to intervene, would hardly transform the current case. Instead the Nation would be bringing claims that the Defendants have known from the outset they would have to defend. The totality of the factors which led the Tenth Circuit to affirm the District Court's determination that the Timpanagos tribe was untimely is just not present in the case presently before the Court.

The U.S. v. Blaine County, Montana, 37 Fed.Appx. 276 case cited by the Defendants is similarly unhelpful. A consortium of Indian people and the tribal government of the Fort Belknap Indian Reservation sought to intervene in a voting rights case. The Ninth Circuit affirmed the District Court's decision in its memorandum opinion finding that the Court had used the correct standard and "did not base its entire timeliness decision on the fact that some degree of delay would result from intervention; rather it properly considered the inevitable delay as one relevant factor." Id. at 277. In that case, the applicants admitted that they had knowledge of the suit and conceded that they knew when the complaint was filed that they could have met the standard of inadequate protection. Id. They failed to offer sufficient explanation for the delay under those circumstances. Id.

The memorandum opinion, barely a page long, does not provide enough factual background to assist the court in interpreting what type of knowledge the applicant had of the suit, the reasons offered by the applicant for failing to attempt an intervention earlier in the proceeding, or what was insufficient about that explanation. It does make it clear that a timeliness decision must be made based upon a consideration of all of the factors, and that some degree of delay alone is not a sufficient basis for a determination that an applicant is untimely.

II. THE PREJUDICE TO THE EXISTING PARTIES IF THE NATION IS PERMITTED TO INTERVENE IS MINIMAL.

The Defendants' arguments of prejudice are mostly unrelated to any delay by the Nation in filing the motion to intervene. The summary judgment motions, Daubert motions, motions in limine and other issues that were rendered moot by the Court's Rule 19 order may arise again as a result of the Nation's participation as a party. However, the only prejudice the Court can properly consider is prejudice caused by the ***timing*** of the Nation's motion to intervene, not prejudice that may arise due to the mere existence of the Nation as a party in the case. The Tenth

Circuit in Utah Ass'n of Counties, 255 F.3d at 1251 specifically held that, "[t]he prejudice prong of the timeliness inquiry measures prejudice caused by intervenors' delay – not by the intervention itself." As such, those considerations should be dismissed by the Court.

The Defendants raise some concerns with the intervention: trial is set to commence in just a few days, both the parties and the court have expended a significant amount of time and resources in pre-trial preparations, much of which the Defendants fear will have to be reevaluated if the Cherokee Nation is permitted to intervene. However, these concerns are substantially outweighed by the prejudice that will be suffered by the Nation and the State if they are not allowed to proceed with their claims against Defendants. The Nation believes that the prejudice claimed by the Defendants is simply not sufficient to overcome the other factors favoring intervention. In addition, the Nation's involvement in this case so close to the trial date is at least in some part due to the Defendant's tardiness in bringing their Motion to Dismiss.

The Defendants also claim that the Nation's intervention will lead to additional complicated legal issues being raised due to possible claims by the United Keetoowah Band of Cherokee Indians in Oklahoma (hereinafter "UKB-CIO") . These concerns are both speculative at best and overblown by the Defendants. Certainly the UKB-CIO has not made any attempt to intervene in these proceedings, and if it did, it's standing to do so is entirely lacking.

The UKB-CIO has no trust land; and certainly none within the Illinois River Watershed. The Assistant Secretary's letter, attached by the Defendant's as Exhibit "I", is more notable by his decision not to act rather than by any action taken. A follow-up opinion written by the Assistant Secretary, attached hereto as Exhibit "A", clarifies that the letter was not intended to change the current status of any trust land held by the Cherokee Nation. In addition, the well-settled law of the District Court and the Tenth Circuit is that the Cherokee Nation currently

attempting to intervene in this lawsuit is the same Cherokee Nation that made numerous treaties with the United States. Buzzard v. Oklahoma Tax Commission, No. 90-C-848-B (N. Okla. Feb. 24, 1992, *aff'd*, 992 F.2d 1073 (10th Cir. 1993), *cert. den'd sub nom.*

In addition, allowing the Cherokee Nation to intervene is beneficial to the Defendants for many of the same reasons they originally raised in their Motion to Dismiss for Failure to Join an Indispensable Party. The addition of the Nation as a party avoids the possibility of inconsistent or multiple obligations by the Defendants and avoids putting the Defendants "in the center of a two-century old conflict over who owns the lands, waters and biota in the IRW…" Defendants Motion to Dismiss, Pg. 2. Although the Defendants now disclaim the prejudice that might result if the Nation is not allowed to intervene, such prejudice exists.

III. THE NATION WILL SUFFER GREAT PREJUDICE IF THE MOTION TO INTERVENE IS DENIED.

The Cherokee Nation is in a situation where nothing short of intervention as a party in this suit will protect the Nation's interests and claims against the Defendants. It was certainly not the Nation's desire to become a party to this suit, as evidenced by the Agreement signed by the Attorney General of the State of Oklahoma and the Attorney General of the Cherokee Nation.

With the ruling on the Rule 19 issue, this Court made it clear that the Agreement could not be used to prosecute the Nation's claims without its intervention. The Court further clarified that the Cherokee Nation and the State of Oklahoma, as two sovereigns with significant but undetermined interests in the IRW, must both be part of the same suit if CERCLA and common law damage claims were to be brought against the Defendants. The sovereign immunity possessed by both the Nation and the State provides an additional barrier to bringing these claims in another action, but even if the Nation and the State were to bring a separate suit against the

Defendants the additional expense to all parties involved would be greater than if these claims were brought in the current suit currently before the Court.

IV. CONCLUSION

Based upon the foregoing, the Nation respectfully requests the Motion to Intervene be granted. (Dkt. #2564)

Respectfully submitted,

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